

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

IN RE MASSEY ENERGY CO.
SECURITIES LITIGATION

CIVIL ACTION NO. 5:10-cv-00689

ORDER

In consideration of Defendants' pending Motions to Dismiss (Documents 94 and 96), the Court has reviewed the parties' written submissions, including Plaintiffs' "Request for Judicial Notice in Further Support of Plaintiffs' Opposition to Defendants' Motions to Dismiss" (Documents 115, 117, 122, 125, 126, 130.) The Court observes that these submissions include filings which are titled "Plaintiffs' Supplemental Proffer of Additional Allegations Supporting Plaintiffs' Request for Leave to Replead the Consolidated Amended Complaint, if Necessary" ("Supplemental Proffer") (Document 122) and "Plaintiffs' Third Proffer of Additional Allegations Supporting Plaintiffs' Request for Leave to Replead the Consolidated Amended Complaint, if Necessary" ("Third Proffer") (Document 130).

The Court further observes that Plaintiffs have made various qualified statements reflecting their "request for leave to replead" their Consolidated Amended Class Action Complaint "[t]o the extent the Court requires amendment of the Complaint." (See Supplemental Proffer at 2-3) (explaining that Plaintiffs learned on June 29, 2011, that "Massey kept two sets of examination books reflecting safety hazards at UBB" and that "additional facts supporting [their] allegations" are submitted "should [the Court] need to consider whether to permit a further amendment of the Complaint"); *see also* Plaintiffs' Reply Memorandum of Law in Further Support of Their Request

for Judicial Notice (Document 126) at 8 (wherein Plaintiffs assert that their pleading is sufficient to withstand a motion to dismiss, but “in the event the Court determines otherwise, Plaintiffs have respectfully requested leave to amend pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.”); Third Proffer at 2 (“Plaintiffs opposed Defendants’ motions on the merits, and also respectfully requested, in the event the motions to dismiss are nonetheless granted in whole or part, leave to amend pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.”).¹ The Court observes that Plaintiffs have made various “proffers” to the Court of information they consider “additional allegations” to their pleading that they “can and will” allege in a second amended complaint. (See Third Proffer at 1-2) (indicating they have proffered a “sampling of additional facts that could, only if necessary, be alleged in a second amended complaint” and that the third Proffer “is not exclusive.”)).

To the extent Plaintiffs assert they have moved to amend their pleading, pursuant to Rule 15(a) the Federal Rules of Civil Procedure, the Court has searched the docket in this matter and finds no such motion in the record.² After careful consideration of the language in these submissions and after a thorough search of the record, the Court **ORDERS** Plaintiffs to provide the Court with a copy of the motion to amend together with the proposed amended pleading, no later than Monday, March 12, 2012.

¹ In the last footnote of their Opposition to Defendants’ motions to dismiss, Plaintiffs state that “[a]ny pleading deficiencies the Court finds can be readily cured by amendment. Plaintiffs offer additional facts that could be alleged in a second amended complaint in Bernstein Decl. Ex. C.” (Plaintiffs’ Memorandum in Opposition to Defendants’ Motions to Dismiss the Consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws (Document 103)).

² The Court neither intends to advise Plaintiffs about whether an amended pleading is necessary, nor is the Court inclined to search the record for such “additional allegations” to meet Defendants’ assertion that they have failed to state a claim upon which relief can be granted.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and to any unrepresented party.

ENTER: March 9, 2012



IRENE C. BERGER

UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA